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No. 07-582

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF *AMICI CURIAE* ALLIANCE DEFENSE FUND AND FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties, sanctity of life, and family values. ADF and its allied organizations represent hundreds of thousands of Americans who object to the eroding standards of decency in our society. Its allies include more than 1,000 lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans to maintain standards of decency and exercise their religious beliefs in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 such cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National*

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Endowment for the Arts v. Finley, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksgerg*, 521 U.S. 702 (1997).

FAMILY RESEARCH COUNSEL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

SUMMARY OF ARGUMENT

Amici contend that there exists a societal interest in maintaining standards of decency. This interest extends to the preservation of standards of decency with respect to the materials broadcast into our nation's homes. Seventy-five years ago, in recognition of this interest, Congress created the Federal Communications Commission ("FCC") and imbued that agency with authority to interpret and enforce broadcast decency standards on the public airwaves.

Over the past 40 years, courts (in the name of preserving individual freedoms) have ignored this societal interest, causing an ever-eroding and ever-devolving set of standards by which we now conduct ourselves as a society. That erosion of standards has led to an ever-increasing willingness and boldness on the part of the nation's broadcast

licensees to include indecent material within their programming. Moreover, it has brought us to this point – where any FCC regulation of indecency is being challenged as invalid, as is the FCC's continued relevance for enforcing decency standards at all.

Amici contend that it is time to once again consider the very real societal interests in maintaining standards of decency, in conjunction with individual freedom of speech rights. The FCC's revised guidance with respect to what constitutes indecency does exactly this. Further, it more logically follows the very type of context-based analysis endorsed by this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court of Appeals' decision to vacate both the FCC's policy and the FCC's decisions regarding the broadcasts at issue is tainted both by that court's failure to accord proper deference to the FCC and by that court's failure to acknowledge societal interests in maintaining standards of decency. Accordingly, the court's decision should be reversed.

ARGUMENT

I. THE FCC'S ACTION RECOGNIZED THE STRONG AND HISTORICALLY-PROTECTED SOCIETAL INTEREST IN PROMOTING PUBLIC DECENCY.

A. Historically, Public Decency Was Recognized and Protected as an Important Societal Value.

From the founding of this nation until relatively recent times, American courts balanced individual freedom of speech rights against society's interest in moral order. Indeed, the Founders considered the protection and advancement of morality to be a fundamental justification for protecting the freedoms of speech and press. First Continental Congress, Appeal to the Inhabitants of Quebec, 1774, quoted in THE HERITAGE GUIDE TO THE CONSTITUTION 311-12 (Edwin Meese III, *et al.*, eds., Washington, DC: Regnery Publishing, 2005). Free speech was not unlimited. It was to be protected to the extent that it furthered the search for truth and an increase in virtue among citizens and their officials. *Id.* at 312.

In the early history of the Republic, our nation's courts consistently recognized the importance of protecting the virtue of society in general and the young in particular:

> Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful...and shall we form an exception in these particulars to the rest of the civilized world?

People v. Ruggles, 8 Johns 545, 546 (Sup. Ct. N.Y. 1811). In a similar vein, the Pennsylvania Supreme Court wrote:

> The destruction of morality renders the power of the government invalid... The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences... No man is permitted to corrupt *the morals of the people*.

Commonwealth v. Sharpless, 2 Serg. & R. 91, 103, 104 (Sup. Ct. Pa. 1815) (emphasis added).

Likewise, this Court noted that, because the fundamental purpose of the free speech guarantee was to foster the attainment of truth and public virtue, many forms of expression were simply outside the scope of First Amendment protection.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and *are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality*.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (citations omitted; emphasis added).

This Court traditionally applied the First Amendment's freedom of speech guarantee in a way that fostered the explication of ideas. Expressions that did not make a constructive contribution to the exposition of ideas – such as expletives, blasphemy or fighting words – were simply not entitled to First Amendment protection. Accordingly, as recently as 1957, Supreme Court decisions followed this long-established view that

indecency was not condoned under the guise of free speech:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel and all of those States made either blasphemy or profanity, or both, statutory crimes.

Roth v. United States, 354 U.S. 476, 481-82 (1957) (citations omitted). The First Amendment safeguarded freedom of speech to the extent necessary to assure society's interest in the interchange of ideas. *Id.* at 484. Thus, as of 1957, this Court continued to apply the First Amendment in a way that protected public morality as well as the free expression of socially worthwhile ideas. Protection of public decency remained a viable rationale for legislative action.[2]

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[2] While it is true that *Roth* was decided in the context of an obscenity charge, the underlying concepts pertaining to the protection of public decency as a viable governmental interest apply equally to the use of all language, whether categorized as obscene, indecent, or profane.

Justice Harlan, concurring in part in *Roth*, emphasized the right of a state legislature to protect public morality:

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the *moral fabric* of society.... The State can reasonably draw the inference that over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on *moral standards*. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Id. at 502 (Harlan, concurring in part and dissenting in part; emphasis added). As of the time of this Court's decision in *Roth*, the existing jurisprudence not only upheld notions of public morality, but allowed individual States the flexibility to determine their own moral standards.

B. Some Court Decisions Have Elevated the Individual Interest in Free Expression Above the Societal Interest in Public Decency.

The States' power to set and preserve moral standards began to diminish with *Jacobellis v. Ohio*, 378 U.S. 184 (1964), in which the Court, by a 6-3 vote, determined that a national obscenity standard should apply. *Jacobellis* also held that obscenity was a question of law for the courts to decide, so that deference to the findings of state juries and legislatures was inappropriate. *Id.* at 194-95. *Jacobellis* also turned the obscenity focus away from what was perceived to be good for the social moral order as a whole and toward only a perceived harm to children instead. *Id.* at 195. *Jacobellis* tended to reduce the protection of public decency by removing local control and focusing on the effect of pornography upon recipients (such as children) as opposed to the effect on public decency in general.

Dissenting in *Jacobellis*, Chief Justice Warren viewed the task of the Court as "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely...." *Id.* at 199. The Chief Justice acknowledged "society's right to maintain its moral fiber." *Id.* at 202. He believed the reconciliation of interests would best be served by the application of local community standards. *Id.* at 202-03.

The moral conscience of the community, formerly critical to the Court's construction of the First Amendment, continued to fade from prominence. In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court reversed field on the importance of social value in the definition of obscenity. Previously, lewd and obscene materials were not considered to be within the First Amendment's protection precisely because they were "of such slight social value as a step to truth...." *Roth*, 354 U.S. at 485. But in *Memoirs*, the Court adopted the converse proposition, to wit, that if an otherwise obscene communication contained any material of redeeming social value, then it could not be banned without violating the First Amendment. *Memoirs vs. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion). After *Memoirs*, pornographers immunized their movies and books against obscenity convictions by injecting small amounts of material that might be deemed to have "redeeming social value." Through this contrivance, publishers of indecent material artificially cloaked themselves with First Amendment protection.

In the late 1960s, the Court handed down dozens of decisions that "elevated pornography and other assaults on decency to the level of a First Amendment right. The Supreme Court reversed dozens of judges, juries, and appellate courts in sixteen states, made laws against obscenity

unenforceable, and lowered drastically the standards of decency in communities throughout America." Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 95, 97 (2008). Many of these decisions were issued *per curiam*, without any recitation of the pornographic material being granted First Amendment protection, and simply citing *Redrup v. New York*, 386 U.S. 767 (1967) (*per curiam*), as their sole justification. At least 27 Supreme Court pornography decisions were issued anonymously during this period, "suggest[ing] that the Justices could not defend the obscenity that they used the First Amendment to protect." Schlafly, *supra*, at 99.

While adopting an "anything goes" approach for pornography sold to adults, the Court applied a more stringent standard for material being sold to minors. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a conviction under a New York criminal obscenity statute that prohibited the sale of obscene material to minors under 17 years of age. In doing so, the Court determined that the "girlie" magazines were not obscene for adult viewers, citing *Redrup v. New York*. Nevertheless, the Court held the conviction proper because the magazines were being sold to children under 17. The Court recognized that the state legislature could reasonably find that minors' exposure to such

material might be harmful. *Ginsberg,* 390 U.S. at 639.

Ironically, the *Ginsberg* decision tended to weaken, rather than strengthen, legislative efforts to protect decency. Just as the "redeeming social value" test was turned on its head to expand First Amendment protection of pornography, the "danger to children" test tended to open the floodgates to pornography aimed at adults. In both cases, the Court's rationale tended to broaden the protection of indecent material and to reject the preservation of public decency as a legitimate legislative interest.

The motion picture industry responded overnight to the new treatment of pornography. "The results of the Academy Awards reflected this abrupt change. In 1965, the Best Picture was *The Sound of Music*; in 1969, the Best Picture was *Midnight Cowboy*, an X-rated film about a homeless male hustler. This new freedom brought obscene language, near-total nudity, graphic sex scenes, and sadistic violence to neighborhood movie theatres." Schlafly, *supra,* at 99-100 (footnote omitted).

The cause of public decency suffered a further setback in *Cohen v. California*, 403 U.S. 15 (1971), a case that "threw First Amendment protection around a man who wore into a courthouse a jacket suggesting, with a short Anglo-Saxon verb, that the

reader perform a sexual act of extreme anatomical implausibility with the Selective Service System." ROBERT H. BORK, COERCING VIRTUE 61-62 (Washington, DC: AEI Press, 2003). Although the jacket was undeniably offensive and was being worn in a public place where women and children were present, the Court, by a 5-4 vote, found that California's effort to excise this scurrilous epithet was unconstitutional. The Court rationalized its decision by saying that people in the courthouse could simply avert their eyes.[3] *Cohen*, 403 U.S. at 21. The Court emphasized the importance of freedom of speech:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be

[3] This recommendation to "simply avert one's eyes" is similar to what parents are being told today – "simply turn it off" or "simply employ the available V-chip technology." Unfortunately, it's never that simple, as neither one of these instructions would have prevented children, or their parents for that matter, from witnessing the infamous "wardrobe malfunction" during the otherwise G-rated national championship game of one of America's favorite pastimes, nor would it have prevented families from hearing the expletives used by Cher and Nicole Ritchie that form the basis of this present action.

> voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 24 (citation omitted). The Court failed to explain, however, how the language used in that case would help produce a more capable citizenry, a more perfect polity, or comport with human dignity.

The five justices forming the slight majority in *Cohen* chose not to distinguish between the vulgar word at issue and words that might acceptably be used to further public discourse. "For while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* at 25. Thus did the Court adopt a moral relativism standard, a sense of an individualistic "anything goes" without regard to society's larger interests, into First Amendment jurisprudence. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 99 (New York: ReganBooks, 1997).

Miller v. California, 413 U.S. 15 (1973), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973),

attempted to slow the growth of pornography. In *Miller*, the Court overruled the *Memoirs* test that to sustain a conviction for obscenity, a prosecutor must prove that the material in question is "utterly without redeeming social value." *Miller*, 413 U.S. at 21. The Court attempted to restore the presumption that obscene material lacked redeeming social value. "It was nearly impossible, however, to turn back the tide of pornography; the damage was already done and continues to this day." Schlafly, *supra,* at 101.

In *Paris Adult Theatre*, 413 U.S. 49 (1973), the Court attempted to reaffirm the lost emphasis on general decency as a valid legislative concern:

> In particular, we hold that there are legitimate State interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.... *[The public has an interest] in the quality of life and the total community environment...*

Id., 413 U.S. at 57-58 (citations omitted; emphasis added). The prior decade of focusing solely on individual rights, however, had done its damage.

C. The Elevation of the Individual's Interest in Free Expression Above the Societal Interest in Decency Has Led to the Coarsening of Society.

By failing to distinguish between offensive vulgarities and those expressions that truly contribute to the exposition of ideas, "the Court, without any authority in the Constitution or any law, has forced Americans to adopt the Court's view of morality rather than their own." BORK, GOMORRAH, *supra*, at 114. As such, the Court itself, in its "solicitude for aberrant individuals," has infringed upon the right of society at large to maintain the majority's notions of decency. BORK, GOMORRAH, *supra*, at 105. This is what the late Senator Daniel Patrick Moynihan called "defining deviancy down." Daniel Patrick Moynihan, *Defining Deviancy Down*, THE AMERICAN SCHOLAR 17 (Winter 1993), cited in BORK, GOMORRAH, *supra*, at 3. Judge Bork describes the cultural decline as follows:

> With each new evidence of deterioration, we lament for a moment, and then become accustomed to it. We hear one day of the latest rap song calling for killing policemen or the sexual mutilation of women;... then of the latest homicide figures for New York City, Los Angeles, or the District of Columbia; of the collapse of

> the criminal justice system...; of the rising rate of illegitimate births; the uninhibited display of sexuality and the popularization of violence in our entertainment; worsening racial tensions; ... – the list could be extended almost indefinitely.
>
> So unrelenting is the assault on our sensibilities that many of us grow numb, finding resignation to be the rational, adaptive response to an environment that is increasingly polluted and apparently beyond our control.

BORK, GOMORRAH, *supra*, at 2-3.

Judge Bork contrasted the lyrics of the 1930s hit "The Way You Look Tonight" with the Snoop Doggy Dogg rap song, "Horny," to illustrate the collapse of American popular culture. BORK, GOMORRAH, *supra*, at 124. He described modern American culture as one that no longer possesses the disciplinary tools of shame and stigma to restrain the most primitive human emotions. BORK, GOMORRAH, *supra*, at 125. It is not surprising that the cultural decline has spread to television.

> Television, not surprisingly, displays the same traits as the movies and music... Language is increasingly

> vulgar.... Recreational sex...is pervasive and is presented as acceptable about six times as often as it is rejected... Television takes a neutral attitude toward adultery, prostitution and pornography. It 'warns against the dangers of imposing the majority's restrictive sexual morality on these practices. The villains in TV's moralist plays are not deviants and libertines but Puritans and prudes.' The moral relativism of the Sixties is now television's public morality.

BORK, GOMORRAH, *supra*, at 127 (citation omitted).

While the Court was expanding First Amendment protection for pornography and other vulgar expressions, it was restricting First Amendment protections for religious expressions. *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding voluntary, non-denominational school prayer); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (forbidding voluntary Bible reading to open the school day); *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting posters of the Ten Commandments in schools); and *Wallace v. Jaffree*, 472 U.S. 38 (1984) (forbidding a voluntary one-minute period of silence in school). As the Court adopted a more expansive view of the so-called "wall of separation between church and state," its

willingness to apply traditional moral values under the Free Speech clause diminished. This, in turn, led to some surprising outcomes. For example, because the Court's rationale in forbidding child pornography was now only to protect child victims and not to vindicate any societal moral interest, virtual (simulated) child pornography has come to be protected as free speech. *See U.S. v. Williams*, 553 U.S. ___ (2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002).

Have the Court's decisions on pornography and other decency issues had any effect on our society? Government data suggests that they have. The birthrate among unwed girls ages 15-19 ranged from 13 to 16 per thousand in the period 1951-63. From 1963 to 1993, the rate soared from approximately 15 per thousand to 45 per thousand. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STATISTICAL ABSTRACT OF THE UNITED STATES, cited in DAVID BARTON, ORIGINAL INTENT 242 (Aledo, TX: WallBuilder Press, 2000). The birthrate among unwed girls ages 15-19 peaked at almost 60 per thousand in 1990. STATISTICAL ABSTRACT OF THE UNITED STATES, http://www.census.gov/compendia/statab/tables/08s0083.xls

Incidence of gonorrhea in the 10-14 age group was below 18 cases per 100,000 population from 1956 to 1963. From 1963 to 1993, it increased dramatically, reaching 70 cases per 100,000 in

1990. U.S. CENTER FOR DISEASE CONTROL AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, cited in BARTON, ORIGINAL INTENT, *supra,* at 244.

Likewise, family stability as measured by two-parent households decreased. During the period 1950-1963, single parent households in the United States were fewer than 5 million. By 1994, this number exceeded 12 million. STATISTICAL ABSTRACT OF THE UNITED STATES, DEPARTMENT OF COMMERCE CENSUS BUREAU, cited in BARTON, ORIGINAL INTENT, *supra,* at 246. By 2006 the United States had over 19 million single parent households, 14 million headed by unmarried women. http://www.census.gov/compendia/statab/tables/08s0058.xls. These are a few among many indicators that as the Court increased Constitutional protection for individual expression without regard to societal interests in preserving and protecting decency, negative consequences followed.

D. This Court Should Support the FCC's Effort to Protect the Societal Value of Public Decency.

It is against this background that Amici respectfully submit that it is well past time that the Court reconsiders the reasoning behind its prior rulings in the area of public decency. By giving First Amendment priority to purveyors of pornography and indecent speech, the Court has,

perhaps unwittingly, condoned a coarsening of our society. This obviously affects not only American children – middle school assignments often include books containing sex, immoral behavior and profanity, Schlafly, *supra,* at 102 – but society as a whole. It is not only children who are debased by an environment of indecency and immorality. How loudly Justice Harlan's prediction of 50 years ago now rings in our ears: "over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." *Roth v. United States*, 354 U.S. at 502 (Harlan, J., concurring in part and dissenting in part). How much louder must we allow the din and clamor to become before acknowledging the error of eliminating the societal interest of preserving and protecting decency from freedom of speech jurisprudence?

The FCC's challenged action is only a small step in the direction of restoring moral decency in modern American culture, but it is one that must be taken and that must be allowed to be taken. The FCC only attempts to regulate indecent broadcasts between the hours of 6 a.m. and 10 p.m. Even fleeting vulgarities contribute to the coarsening of our culture. To the extent the FCC has determined that even a fleeting expletive constituted a harmful blow to public decency, its finding should be sustained.

It is absurd to argue that society cannot legislate morality. In fact, all legislation is an expression of a society's morality. By striking down so many legislative pronouncements designed to support public morality, this Court "has dictated *immorality* through First Amendment jurisprudence." Schlafly, *supra,* at 95.

By expanding protection of pornography and other vulgarities while restricting public religious expression, this Court has had a profound effect on what one scholar has termed our "moral ecology." ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (Oxford Univ. Press, 1994). The Founders considered public morality indispensable to the maintenance of a free society. As President John Adams stated:

> [W]e have no government armed with power capable of contending with human passions undebridled by morality and religion.... Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.

JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (Charles Frances Adams, ed., Boston: Little, Brown and Company, 1854), Vol. IX, cited in BARTON, ORIGINAL INTENT, *supra,* at 319. In a similar vein,

Benjamin Franklin said, "[o]nly a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters." BENJAMIN FRANKLIN, THE WORKS OF BENJAMIN FRANKLIN 297 (Jared Sparks, ed., Boston: Tappan, Whittimore and Mason, 1840), Vol. X, cited in BARTON, ORIGINAL INTENT, *supra,* at 321. The wisdom of our Founders and the cultural decline of the last fifty years suggest that the societal interest in decency and virtue is worthy of legal protection. To the extent the challenged FCC decision is an effort to support and enforce decency standards, the public interest demands that it be sustained.

II. THE COURT OF APPEALS IMPROPERLY INTERFERED WITH THE FCC'S DUTY TO PROTECT PUBLIC DECENCY.

A. Congress and this Court Have Recognized the FCC's Duty to Protect Public Decency.

In the Radio Act of 1927, the United States Congress first enacted a statute prohibiting the uttering of "any obscene, indecent, or profane language by means of radio communication." (Currently codified at 18 U.S.C. § 1464). Seven years later, Congress passed the Communications Act of 1934 (the "Act"), 47 U.S.C. §§ 151-614, to provide for the regulation of interstate and foreign communication by wire or radio. The initial section of the Act created the FCC, recognizing the FCC as the authority charged "to execute and enforce the

provisions of the Act." 47 U.S.C. §151. To allow the FCC to carry out that charge, Congress armed the FCC with several enforcement tools, including the power to revoke a station license for violating the prohibition against broadcasting obscene or indecent language. *See* 47 U.S.C. § 312(a)(6), as well as the power to order licensees to cease and desist from violations of that same prohibition, *see* 47 U.S.C. § 312(b).

Moreover, Congress empowered the FCC to "make such rules and regulations...as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Pursuant to this grant of authority, the FCC has promulgated rules, including one that states that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent," 47 C.F.R. § 73.3999(b)[4], and another which vests the FCC with the responsibility of "[resolving] complaints regarding compliance with statutory and regulatory provisions regarding

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[4] Congress expressly directed the FCC to take steps to determine the appropriateness of, and to promulgate regulations pertaining to, the broadcasting of indecent television or radio programming between the hours of 6AM and 10PM. *See* §16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992). The FCC's promulgated rule was ultimately upheld. *See Action for Children's Television v. FCC*, 58 F.3d 654, 669-670 (D.C.Cir.1995), *cert. denied,* 516 U.S. 1043 (1996).

indecent communications." 47 C.F.R. § 0.111(a)(7). Indecent communication is defined as language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.[5] *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (Mar. 14, 2001).

While granting broad authority to the FCC, the Act does provide certain limitations to the FCC's authority, stating that the FCC has no "power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. However, this Court has determined that this section does not limit the FCC's authority to impose sanctions on licensees who engage in indecent or profane broadcasting. *FCC v. Pacifica Foundation*, 438 U.S. 726, 738 (1978)(respect for Congress' intent "requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.")

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[5] Indecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity.

Notwithstanding the above, it is clear that the FCC has historically endeavored to consider and achieve a proper balance between (a) its Congressionally-mandated charge to enforce our nation's broadcast indecency statutes and (b) concerns of inappropriate and overly broad regulation. The Court of Appeals now seeks to upset that proper balance, effectively determining that there is no longer a need for the FCC to fulfill a charge to enforce indecency statutes.

For the past 30 years, the FCC has been guided in its efforts by this Court's pronouncements in the *Pacifica Foundation* case, 438 U.S. at 726 (1978). *Pacifica* emphasized that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 748. Among the reasons given by the Court for this more limited protection are the uniquely pervasive presence that medium of expression occupies in the lives of all Americans, *id.* at 748-49, and the unique accessibility of broadcasting to children, even if too young to read, *id.* at 749-50.

Most importantly, the Court in *Pacifica* emphasized that the "specific factual context" is key to judging whether language is indecent. *Id.* at 742. The Court stated:

> [T]he constitutional protection accorded to a communication containing such patently offensive sexual and

> excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term,[6] vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. In this case, it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.

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[6] The *Pacifica* Court earlier included, with approval, a quote from Justice Murphy's opinion in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942), specifically: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Pacifica,* 438 U.S. at 746. Justice Murphy's comments are clearly *apropos* to the current facts before this Court, and Family Research Council wholeheartedly endorses Justice Murphy's sentiment and conclusions.

Pacifica, 438 U.S. at 747-48 (citations and footnotes in original omitted).

The Court further stated:

> The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

Pacifica, 438 U.S. at 750.

Clearly, in evaluating a potential indecency violation, the FCC must consider a variety of factors, in which context is central. Each of the factors mentioned by the *Pacifica* Court (i.e., context of statement, time of day, composition of audience, etc.) are considerations for the FCC in its role as the Congressionally-mandated agency with the responsibility to oversee broadcast indecency. And, in fact, the FCC did review such factors in determining that the language used in these two instances constituted indecency: (1) the time of day – prior to 10 p.m. when millions of children would

be in the audience; (2) the program content – an awards ceremony where it could be anticipated that the home viewing audience would include unsuspecting families with their children; (3) the shocking use and surprise of such language on a major network during primetime; (4) the clear intent on the part of at least one of the speakers (*i.e.,* Nicole Richie) to depart from the script for the express purpose of shocking the audience by uttering the offensive words; and (5) the considerable complaints that followed. Each of these factors was recognized by the *Pacifica* Court as bearing upon the ultimate determination of whether the words spoken constituted indecent language, and supports the FCC's decision. The Court of Appeals' difference of opinion should neither be permitted to usurp the FCC's reasoned decision and authority, nor should it prevent the FCC from carrying out its Congressionally mandated responsibility.

B. The Second Circuit Improperly Substituted its Judgment for the Reasonable Judgment of the FCC.

In authorizing the FCC to regulate the communications industry, Congress provided broad discretionary power to the FCC to establish, change, and enforce its rules and policies. Thus, an agency's decision will be upheld by a court unless found to be "arbitrary, capricious, or an abuse of discretion." *See* 5 U.S.C. § 706(2)(A). The scope of

review under the arbitrary and capricious standard is narrow and a court is not allowed to substitute its judgment for that of the agency. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("*Motor Vehicle Manufacturers*"). The court must further "consider whether a decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*. An agency, on the other hand, must examine relevant information and provide a reasonable explanation, which includes a rational connection between the facts found and the choice made." *Id.* . Nevertheless, a reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* [7]

With respect to policy changes, an agency must both acknowledge and explain policy changes. *Motor Vehicle Manufacturers* at 41-44 (agency

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[7] *See also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984)(a court may not substitute its own opinion as to the policy to be employed, but is limited to determination of whether the agency's promulgated policy is a reasonable one.) *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)(a court must not "substitute its judgment for that of the agency"); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.,* 435 U.S. 519, 558 (1978) ("Administrative decisions should [not] be set aside ... because the court is unhappy with the result reached.").

required to provide a reasoned analysis for the change).[8] As stated by the *Chevron* Court, "[a]n initial agency decision is not carved in stone" and an agency is free to revise its rules and policies but must provide a reasoned analysis for departing from the prior precedent. *Chevron, U.S.A., Inc.* 467 U.S. at 863. The Court specifically stated that:

> [W]hen an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. . . Although there is not a "heightened standard of scrutiny ...*the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" Even in the absence of cumulative experience, changed circumstances or judicial criticism, an agency is free to change course after reweighing the competing statutory policies. But such a flip-flop

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[8] See *also AT&T v. FCC*, 974 F.2d 1351 (D.C.Cir.1992)(agency must acknowledge a change in policy); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)(agency must provide reasoned analysis that prior policies and standards are being deliberately changed, not casually ignored).

> must be accompanied by a reasoned explanation of why the new rule effectuates the statute *as well as or better than the old rule.*

Id. (emphasis added)

In this case, the FCC, in response to specific complaints by the viewing public, determined that the Billboard Music Awards broadcasts had violated FCC rules on indecent language. It further provided a very detailed and reasoned explanation for this decision as well as for its revised policy on expletives, consistent with the APA, 5 U.S.C. § 706(2)(A).[9] In its review of the FCC's determinations, the Court of Appeals ignored the deferential standard of review it was supposed to follow, and instead thrust itself into the decision-making role of the FCC. In holding that the FCC did not *adequately* explain the reasons for its change of policy on "fleeting expletives," the Court

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[9] It is arguable whether any significant change in policy actually occurred. The FCC's "fleeting expletive" rule continued to consider the *context* of any broadcast alleging indecent material or language, with the number of uses of the offending language one of the factors to be considered. In his dissenting opinion, Circuit Judge Leval identified the FCC's decision to accord a lesser weight to one of the context factors (*i.e.,* whether the offending language is repeated) as a "relatively modest change of standard." *Fox Television Stations, Inc. v. Federal Communication Commission*, 489 F.3d 444, 468 (2008) ("*Fox v. FCC*").

of Appeals completely disregarded the FCC's clearly enunciated reasons. See Remand Order at ¶¶ 11-66; FCC Petition at 13-30. Certainly, the Court of Appeals *point-by-point* rebuttal of each of the FCC's reasons for its revised policy belies the court's contention that the FCC failed to provide a reasoned explanation. While the Court of Appeals is entitled to review the relevant record in considering whether the FCC's actions are arbitrary and capricious, 5 U.S.C. § 706, it is not permitted to substitute its own reasoning and analysis for that of the FCC. Rather, the Court of Appeals was required to restrict its analysis to whether the FCC had a reasoned analysis for the decision, comprising a permissible construction of the statute, as intended by Congress. *See Chevron*, 467 U.S. at 843 ("the question for the [reviewing] court is whether the agency's answer is based on a permissible construction of the statute.")

The FCC's decision to prospectively make its determinations of what constitutes indecent language by looking at the totality of circumstances rather than merely the number of times an expletive is uttered is certainly a reasonable and rational approach to the Congressional mandate to enforce the indecency statutes. Even the *Pacifica* opinion, which the Court of Appeals holds up again and again in its ruling as a model of how to proceed cautiously in this area, suggests that it would be reasonable, *in the proper context*, to find a single

utterance of an expletive to be indecent language. *See Pacifica,* 438 U.S. at 748-49 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.") Returning to the context-based determination suggested by the *Pacifica* Court hardly seems arbitrary and capricious, especially when the appropriate standard of review requires a reviewing court to give deference to an agency decision.

Indeed, the FCC provided a detailed explanation demonstrating why its "change" in policy is consistent with the context-based approach in *Pacifica* and why context-based distinctions regarding indecent language, whether fleeting or otherwise, is more rational than a policy that would sanction – or not sanction – indecent language regardless of the context. FCC Petition at 15-19. Such a policy actually demonstrates restraint on the part of the FCC and a healthy respect for free speech principles, notwithstanding the FCC's obligation to pursue complaints of broadcast indecency. In addition, the FCC also explained why a non-repetitive use of certain expletives would no longer result in a virtual free pass. *Remand Order* at 29a. Certainly, by any objective standard, the FCC provided a reasoned explanation for its purported change of policy on "fleeting expletives."

As a result, under the proper standard of review, the Court of Appeals should have deferred to and upheld the FCC's judgment on how best to enforce its broadcast indecency rules. Instead, it improperly disregarded the FCC's reasonable analysis and inserted its own. Accordingly, the Court of Appeals judgment should be reversed.

CONCLUSION

Amici Alliance Defense Fund and Family Research Council respectfully request that this Court reverse the judgment of the Court of Appeals, and remand the case to that court for further proceedings.

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